

# Revisiting indemnity claims in time charters under Norwegian and English law

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Submission deadline: 1 November 2013

Number of words: 15,189



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## **Acknowledgements**

I would like to thank professor Trond Solvang for his accurate suggestion on the dissertation topic, patience during the discussions and very useful and fast feedback. I am also grateful to the staff at NIFS, Kirsten Al-Araki for her valuable help with books and pieces of legislation and to Ida Stabrun for her guidance on the formal aspects of this dissertation.

I am especially grateful to my wife Christine Finbak for encouraging me to take the LL.M. in Maritime Law at the University of Oslo and for all her help and double-checking the translations of the Reports of the 1938 and 1993 Maritime Law Committees from Norwegian to English. Furthermore, I would like to express my gratitude to my brother Julian Sottile for his tremendous endurance in life. Finally, thanks to my family and everyone that made this dissertation possible.

Note to the reader: Some legal sources were only available in Norwegian. Thus, I have produced translations to English of the relevant passages in order to try to provide a full panorama of the legal discussions on indemnities in chartering. Any flaws, mistakes or inaccuracies are my exclusive responsibility.

# 1 INTRODUCTION

## 1.1 Objective of the dissertation and main legal questions

What is the main goal of this dissertation? Its purpose is to compare and analyze principles, rules and case law applicable to time charter indemnity provisions in situations where the shipowner incurs greater liability for bills of lading inconsistent with charterparty terms, under Norwegian and English law. This is an issue that has been discussed for many years and still preserves its classic importance.<sup>1</sup> In practice, indemnity claims between shipowners and charterers are brought to court or arbitration regularly.

In addition, this dissertation aims to contribute to the analysis of the following legal questions:

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<sup>1</sup> Jens Vogth-Erikse, 'Regress I certepartiforhold', MarIus no. 53 (1980); Haakon Stang Lund, 'Regress mellom partene i certepartier og fraktkontrakter', I Lov, dom og bok, Festskrift til Sjur Brækhus (Universitetsforlaget 1988); Susanne Moshuus, 'Lasteansvar I tidsbefraktningensforhold', MarIus no. 193 (1992); Trond Solvang, 'Bills of lading issued under voyage charterparties: review of legal position under English and Scandinavian law – practical advice on how to secure shipowners' right of indemnity from charterers for liabilities incurred under bills of lading' in Nordisk Medlemsbladet (2003); David Foxton, 'Indemnities in Time Charters' in Rhidian Thomas (edit.), *Legal Issues Relating to time Charters* (Informa 2008); Qian Dong, 'Shipowner's liability towards the third party: with focus on bills of lading and charterparties', (Masteroppgave University of Oslo 2009); Falkanger, Thor, Hans-Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (3<sup>rd</sup> edn, Universitetsforlaget 2011), p. 413, 449; Trond Solvang, 'The English doctrine of indemnity for compliance with time charterers' orders – does it exist under Norwegian law?', MarIus n. 419 (2012).

- 1) How indemnities have been understood in time charters under Norwegian and English law?
- 2) Whether or not solutions on indemnities in time charters would be similar in Norway and England, in situations where the shipowner incurs greater liability for bills of lading inconsistent with charterparty terms.

## 1.2 Legal systems

This thesis will examine indemnities in time charters in two legal systems, i.e. Norwegian and English.

Norway may be defined as a Northern-European civil law country with its legal system based on the European codification model dominant at the time the 1814 Constitution was drafted. However, there is no complete and organic codification of private law.<sup>2</sup> In its uniqueness, Norway claims to have adopted similar but not equal legal rules together with other Nordic countries in some areas of law. This is reflected in the importance of case law in the maritime context.<sup>3</sup> The Helsinki Treaty is also a conspicuous example of the high level of co-operation in the legislative area among Nordic Countries where legal uniformity is aimed in civil, crim-

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<sup>2</sup> Article 94 of the 1814 Norwegian Constitution  
<<http://stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/>>  
Accessed 19.06.2013

<sup>3</sup> Falkanger, Thor, Hans-Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (3<sup>rd</sup> edn, Universitetsforlaget 2011), p. 31. The authors of this text-book expressed the view that in the context of the Maritime Code, it is common to cite the most significant judicial decisions from other Scandinavian countries “[...] in support of a particular interpretation [...]”. Since 1900 there is a “[...] common compilation of case reports ‘Nordiske Domme i Sjøfartsanliggender’ (ND) (i.e. Scandinavian Maritime Decisions) published by Nordisk Defence Club [...]” Furthermore, Nordic Countries have a long-standing tradition when it comes to give uniformity to their maritime legislation, e.g. the 1893 Code.

inal and any other appropriate legislation.<sup>4</sup> The Helsinki Treaty was signed between Denmark, Finland, Iceland, Norway and Sweden and aims “[...] to promote and strengthen the close ties existing between the Nordic peoples in matters of culture, and of legal and social philosophy, and to extend the scale of co-operation between the Nordic countries [...] to attain uniformity of regulation throughout the Nordic countries in as many respects as possible.”<sup>5</sup>

England is the birthplace of the common law legal system.<sup>6</sup> Geographically, it comprises England and Wales.<sup>7</sup> Nonetheless, common law is also a term that “[...] may refer to a legal tradition which defines the English legal system and other derivative legal systems as opposed to the civilian legal tradition exemplified by the systems of mainland Europe.”<sup>8</sup> Common law system covers a method in which law and principles are developed by judges based on the *stare decisis* principle (judicial precedent). Furthermore, the body of judgments is also called common law.

In Norway, statutory sources and preparatory works play a central role compared to English

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<sup>4</sup> The Helsinki Treaty was signed on 23 March 1962 and entered into force on 1 July 1962 <<http://www.norden.org/en/about-nordic-co-operation/agreements/treaties-and-agreements/basic-agreement/the-helsinki-treaty>> Accessed 29.08.2013

<sup>5</sup> See Preamble of The Helsinki Treaty <<http://www.norden.org/en/about-nordic-co-operation/agreements/treaties-and-agreements/basic-agreement/the-helsinki-treaty>> Accessed 29.08.2013

<sup>6</sup> Cownie, Fiona, Anthony Bradney & Mandy Burton, *English Legal System in Context* (Oxford University Press 2007) p. 1.

<sup>7</sup> Wilson, Steve, Rebecca Mitchell, Tony Storey & Natalie Wortley, *English Legal System Directions* (Oxford University Press, 2011), p. 4  
<[http://fds.oup.com/www.oup.com/pdf/13/9780199592241\\_chapter1.pdf](http://fds.oup.com/www.oup.com/pdf/13/9780199592241_chapter1.pdf)> Accessed 20.06.2013

<sup>8</sup> Wilson, Steve, Rebecca Mitchell, Tony Storey & Natalie Wortley, *English Legal System Directions* (Oxford University Press, 2011), p. 6  
<[http://fds.oup.com/www.oup.com/pdf/13/9780199592241\\_chapter1.pdf](http://fds.oup.com/www.oup.com/pdf/13/9780199592241_chapter1.pdf)> Accessed 20.06.2013

law. Nonetheless, under Norwegian law, judges may consider previous case law in support of their decisions. However, authority of prior judicial decisions does not oblige them in the same manner as under English law.

Furthermore, contract terms under English law have great importance. English law analyses how terms are included in the contract, their construction, if the contract contains implied terms and whether there should be control over terms, e.g. unfair terms. In Norway contractual terms are also very relevant. Norwegian law also analyzes the intention of the parties as well as whether there should be control over terms of the contract (mandatory rules) and whether statutory sources should fill any gaps in the contract (supplementary rules).

### 1.3 Role of indemnity provisions in charterparties

Indemnity provisions enable one of the parties of a charterparty to seek compensation towards the other party for liabilities, losses or costs incurred by the first. These provisions are present both in voyage and time charters.<sup>9</sup> Furthermore, indemnity clauses generally work in connection with an exclusion of liability clause. An exclusion clause aims to remove liability and an indemnity clause imposes an obligation to cover liabilities or expenses. Then, if a charterparty contains both an exclusion clause and indemnity, shipowners may find appropriate protection against certain liability situations.

A time charter is “[...] a contract under which fully manned and equipped ship’s capacity is made available to a time charterer for a specified period.”<sup>10</sup> Time charters have been also defined in the Norwegian Maritime Code Section 321, second paragraph, as the chartering

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<sup>9</sup> Cf. Sections 338, 381 and 382 of the Maritime Code.

<sup>10</sup> Falkanger, Thor, Hans-Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (3<sup>rd</sup> edn, Universitetsforlaget 2011), p. 417.

where remuneration is calculated “per unit of time”. Furthermore, parties to a time charterparty usually use international standard forms.

In time chartering, indemnity is a core element of the contract due to the functions that the parties play. The purpose of an indemnity provision is to balance the allocation of risks arising from these functions. For example, expenditures and liability in connection with the “[...] commercial operation of the vessel, including liability for the cargo, are for the account of the time charterer [...]”<sup>11</sup> including other liability that can be attributed to the crew of the vessel. On the other hand, the shipowner, under a time charter, assumes the nautical and technical management of the ship. Therefore, costs and liability arising from performing these functions shall be assumed by the shipowner.

Under a time charter the property of the vessel remains with the shipowner and solely the use of the vessel that has been placed at the charterer’s disposal is transferred to him temporarily. Thus, the charterer will order the master of the vessel to perform voyages and load and unload cargoes. The charterer will have these rights for a period of time and subject to payment of hire to the owner, in accordance with specific terms of the time charter. In economic terms, what happens is that the charterer generally assumes the variable costs flowing from the contract<sup>12</sup>, and fixed costs are to be borne by the shipowner.<sup>13</sup> Differences between the specific functions of the parties in a voyage or time charter may impact the construction of indemnities.

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<sup>11</sup> See ND 1979.364 NV (Jobst Oldebdorff); see the English translation in Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 32.

<sup>12</sup> Baltim Clause 4, lines 48-71 and Clause 5, lines 72-79; NYPE Clause 7, lines 84-94; Shelltime Clause 7, lines 97-103; see also Norwegian Maritime Code Section 387.

<sup>13</sup> Baltim Clause 3, lines 37-47; NYPE Clause 6, lines 78-82; Shelltime Clause 6, lines 87-96.



In voyage charters the functions of the parties are slightly different. The shipowner transports cargo for remuneration calculated per voyage, i.e. from port A to port B, pursuant to Maritime Code Section 321, second paragraph, and per cargo quantity.<sup>14</sup> Thus, parties to a voyage charter assume other costs and liabilities when compared to those assumed under a time charter.<sup>15</sup>

Indemnity may be confused with a situation of damages due to breach of contract. Indemnities are in fact based on the compliance of orders from the charterer. Breach of contract is based on non-compliance of contractual terms. However, the implications are similar. Early English case law did not distinguish clearly between indemnities and breach of contract. This will be further developed in Chapter 2.

As for liabilities incurred by the shipowner towards third parties, one has to bear in mind that in charter trade there will be, on the one hand, a chartering agreement between the shipowner and the charterer. On the other hand, the shipowner will enter into contracts of carriage with cargo owners when performing his transportation obligations under the charter and the shipowner or his master will sign or accept bills of lading complying with charterer's instructions. There will be a sort of double regulation situation that may create frictions between the charterparty and contracts of carriage (evidenced by bills of lading and subject to mandatory rules pursuant to Chapter 13 of the 1994 Maritime Code). Thus, in charterparty trade, indemnities find their origin in the lack of coordination of liability provisions between charters and bills of lading and/or waybills.

#### 1.4 Freedom of contract in charterparties under Norwegian law

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<sup>14</sup> Falkanger, Thor, Hans-Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (3<sup>rd</sup> edn, Universitetsforlaget 2011), p. 367.

<sup>15</sup> Gencon Clause 1, lines 1-14, Clause 4, lines 32-49 and Clause 5, lines 50-88.

Freedom of contract plays a central role and constitutes the general rule in chartering under English and Norwegian law.<sup>16</sup> Nonetheless, Maritime Code Chapter 13 will be mandatorily applicable if conditions pursuant to Sections 252 and 253 are present. Furthermore, Chapter 14 of the 1994 Maritime Code confirms this general rule but also contains some exceptions as one will see below.<sup>17</sup>

In charterparty trade, parties are professional players with equal knowledge of the particular trade and have a similar if not equivalent bargaining power when negotiating these contracts. Parties are allowed to freely agree on the terms of the contract. However, as said, Chapter 14 contains some limitations to the latter freedom, both applicable to in voyage and time charters. Statutory control over contractual freedom takes the form of mandatory rules provided in Chapter 13 and applicable to cargo damage and delay situations in the context of charterparty trade and (cf. Sections 253 and 322).

As for voyage chartering, there are limitations in inter-Nordic trade as per (i) Section 322, second, third and fourth paragraphs; (ii) tramps bills of lading pursuant to Section 325; (iii) and, for cargo damage and delayed delivery pursuant to Section 347. The main implication is that Sections 274 to 285 and 287 to 289 will be applicable between the shipowner and the charterer and between the shipowner and the receiver who is not the voyage charterer or between the shipowner and a holder of a bill of lading. Section 286 applies to sub-carrier liability.

In time chartering, there are also some limitations pursuant to (i) Section 325 on tramps bills of lading; (ii) and Section 383 makes applicable Sections 274 to 285 and 287 to 289 (on cargo liability and limits of liability of the shipowner), between the shipowner and the charterer, between the shipowner and the receiver who is not the time charterer and between the shipowner and a bill of lading holder. Section 286 on the liability of the sub-carrier applies cor-

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<sup>16</sup> Cf. Section 322, second paragraph.

<sup>17</sup> Sections 321 to 325; also in particular for time charters, see Sections 372 to 394.

respondingly as well. Furthermore, pursuant to Section 383, first paragraph, second sentence, provisions regarding domestic trade in Norway in Section 276, third paragraph, on loss due to nautical fault and fire and Section 280, second paragraph, on limits of liability, do not apply. International charterparty trade does not fall in this situation.

### 1.5 Mandatory rules dogma under Norwegian law

Mandatory rules are rules that will be enforced irrespective of the intention of the parties as expressed in the contract. Default or supplementary rules can be modified by agreement and fill contractual gaps left by the parties.

The Norwegian approach on indemnities in situations where the shipowner incurs greater liability for bills of lading inconsistent with the terms of the charterparty flows from various legal sources.<sup>18</sup> Under English law, solutions on analogous indemnity situations have developed from a line of general common law cases and both voyage and time charter decisions.<sup>19</sup>

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<sup>18</sup> See the Norwegian Maritime Code Sections 338, third paragraph and 382, first paragraph, second sentence; see also *The Vestkyst I* case in ND 1961.325 NH and *The Jobst Oldendorff* arbitration award in ND 1979.364 NV. However, there are other Norwegian cases dealing with indemnities in time charters but not exactly with the particular issue of mandatory rules. In particular, see ND 1954.445 NSC (Skogholm); ND 1957.61 NSC (Skånland); ND 1961.127 NV (Granville) commented in Falkanger, Thor, Hans-Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (3<sup>rd</sup> edn, Universitetsforlaget 2011), p. 447.

<sup>19</sup> *Adamson v Jarvis* (1827) 4 Bing 66; *Humphrys v Pratt* (1831) 5 Bli NS 154; *Betts v Gibbins* (1834) 2 Ad & E 57; *Toplis v Grane* (1839) 5 Bing NC 636; *Dugdale v Lovering* (1875) 10 CP 196; *Milburn v. Jamaica Fruit* [1900] 2 Q.B. 540; *Sheffield Corporation v. Barclay* [1905] A.C.; *Kruger v. Moel Tryvan* [1907] A.C. 272 as per Lord Loreburn; *Tillmanns v. Knutsford* [1908] A.C. 410; *The Berkshire* [1974] 1 Lloyd's Rep. 185; *The Nanfri* [1979] 1 Lloyd's Rep. 201; *The Vikfrost* [1980] 1 Lloyd's Rep. 560; *The Garbis* [1982] 2 Lloyd's Rep. 283; *The Caroline P* [1984] 2 Lloyd's Rep. 466; *The C. Joyce* [1986] 2 Lloyd's Rep. 285; *The Paros* [1987] 2 Lloyd's Rep. 269; *The Nogar Marin* [1988] 1 Lloyd's Rep. 412; *The Island Archon* [1994] 2 Lloyd's Rep. 227; *Petroleo Brasileiro S.A. (Respondent) v E.N.E. Kos I Limited* (Appellant) [2012].

Mandatory rules contained in Chapter 13 will be applicable to contracts of carriage and also to charterparty trade if conditions pursuant to Sections 252 and 253 are fulfilled.<sup>20</sup> Furthermore, liability will be imposed upon the shipowner if cargo liability elements are present pursuant to Sections 274, 275 and 276.<sup>21</sup>

Under Norwegian law, *The Vestkyst I*, a voyage charter case (“*The Vestkyst I*”), involved an indemnity claim from the shipowner that incurred greater liability for bills of lading inconsistent with the charterparty terms.<sup>22</sup> Indemnity against the charterer was based on the 1893 Maritime Code Section 95, third paragraph (current Maritime Code Section 338 that also finds its parallel in Section 382 on time charters), and on a broad exclusion of liability clause contained in the Gencon charterparty. The Norwegian Supreme Court interpreted the exclusion of liability clause in a stricter manner, only considering its passive implication, and not as a course of action (only as a shield, not as a sword). This particular point is aligned with the English case *The C. Joyce* that will be analyzed in Chapter 2.<sup>23</sup> Reasonable arguments could be raised in order to interpret an exclusion of liability clause in the opposite manner but practice shows that Gencon voyage charters these days have been amended and that an express

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<sup>20</sup> Under Norwegian law see Act of 4 February 1938 no. 3 on the Implementation of the International Convention on Bills of Lading of 24 August 1924. The Hague-Visby Rules or amended Hague Rules were introduced domestic legislation in 1973. However, these days not every Section in Chapter 13 of the Norwegian Maritime Code belongs to the Hague-Visby Rules. Chapter 13 of also adopted some rules from the 1978 United Nations Convention on the Carriage of Goods by Sea or Hamburg Rules. The Hamburg Rules represent a later set of rules on international carriage of cargo by sea and multimodal transportation. In England the Hague Rules were ratified in 1930. In addition, the Hague-Visby Rules became effective in England pursuant to the 1971 Carriage of Goods by Sea Act (as per Section 1). The 1992 Carriage of Goods by Sea also supplements the 1971 Act and constitutes the most recent statutory regulation on bills of lading rules under English law.

<sup>21</sup> See Chapter 13, Sections 274 to 290, on the Carrier’s Liability for Damages.

<sup>22</sup> ND 1961.325 NH (*Vestkyst I*).

<sup>23</sup> *The C. Joyce* [1986] 2 Lloyd’s Rep. 285.

indemnity for bills of lading consequences and liabilities has been included in order to avoid any uncertainty.

Furthermore, the Supreme Court rejected the argument based on Section 95, third paragraph. The reason was that Section 95 does not apply when increased liability in bills of lading results from the application of mandatory rules (Hague Rules as incorporated in 1938 to the Maritime Code). The effect was that in this particular case a contractual gap (absence of express indemnity) plus the application of mandatory rules did not admit recourse. The latter point constitutes a dogmatic approach that will be analyzed in depth, as one of the central topics of this dissertation.

Chapter 2 of this thesis aims to prove that the approach of the Supreme Court in *The Vestkyst I*, on the applicability of mandatory rules constitutes a *dogma*. A dogma is a belief accepted without question.<sup>24</sup> First, due to the absence of analysis regarding how mandatory rules interact with indemnity provisions in situations of inconsistency between bills of lading and charterparty terms under Norwegian law. Second, due to the scarce explanation of how freedom of contract plays a fundamental role as a matter of principle in these cases. Third, the Supreme Court did not explain what would have been the result had the shipowner incurred liability from mandatory rules under a charterparty containing an express indemnity. Cargo liability to a shipowner is most of the time imposed due to the application of mandatory rules that protect the cargo side and if recourse is rejected due to their operation, that would mean that express indemnity clauses would not be likely upheld either.

In the aftermath of *The Vestkyst I* case, arbitrator professor Brækhus when rendering *The Jobst Oldendorff* arbitration award undertook further analysis on the application of *The Vest-*

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<sup>24</sup> <<http://www.merriam-webster.com/dictionary/dogma>> Accessed 21.10.2013

*kyst I* case as a matter of principle. I will refer to the relevant ideas of this arbitration as far as they are related to the topic of this thesis.<sup>25</sup>

Furthermore, the existence of the aforesaid dogmatic approach constitutes an open invitation for research, making a comparative analysis with English related doctrines on indemnity recourses in charter parties. Whether *The Vestkyst I* mandatory rules dogma is likely to be applicable these days also to equivalent indemnity situations in time charters is something that definitively deserves further analysis. Therefore, this dissertation attempts to provide additional elements to consider.

This thesis aims to prove primarily that the application of *The Vestkyst I* doctrine to time charters may not be entirely suitable if we contrast it with solutions under English law. Furthermore, as said, even these days, the application of *The Vestkyst I* doctrine to voyage charters would not be appropriate either, because current Gencon voyage charter, Clause 10, contains an express indemnity for bills of lading liabilities.<sup>26</sup>

The English approach to indemnity in time charters does not consider the interaction of contractual terms with mandatory rules of law. Under English law it has never been a legal question brought to courts. Had the mandatory rules dogma been tested under English law, courts would have had quite a few opportunities to deal with analogous dogmas, since the ratification of the Hague and Hague-Visby Rules. Curiously, research for this dissertation has shown that it has never examined this issue in such a manner. English law distinguishes between express and implied indemnities, as will be explained. Also English law considers other ele-

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<sup>25</sup> See *The Jobst Oldendorff* arbitration award ND 1979.364 NV; see English translation in Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 30.

<sup>26</sup> Gencon 1994, Clause 10, lines 154-163, contains an express indemnity from the charterer to the shipowner “[...] against all consequences or liabilities that may arise from the signing of bills of lading as presented [...]”.

ments, such as foreseeability and types of recoverable damages when analyzing such disputes.

This thesis aims to show that English law has similar solutions, when compared to Norwegian law, on whether or not to grant indemnity recourses in cases of shipowner liability for bills of lading containing different terms from those in charterparties. It also aims to prove that bases for indemnity provisions under English law somewhat differ. This will be developed in Chapter 2.

## 1.6 Indemnity provisions under Norwegian law

Section 382, first paragraph, second sentence, provides basis for indemnity in situations where the shipowner “[...] incurs liability to the holder of a bill of lading in excess of the liability according to the chartering agreement”<sup>27</sup>. This implied indemnity will be analyzed below because it is one of the central points of this dissertation.

Norwegian law also accepts the use of standard forms that contain express indemnity clauses, e.g. Shelltime Clause 13, NY Produce Clause 30 (b), Baltime Clause 9.

Maritime Code, Section 338, third paragraph, second sentence, in the case of voyage charters, provides basis for implied indemnity in situations where the shipowner incurs greater liability for issuance of bills of lading containing other terms than those stated in the charterparty.<sup>28</sup> This Section will be analyzed in this dissertation due to the role it may play in the interpretation of Section 382, second paragraph, second sentence.

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<sup>27</sup> Cf. Section 382, first paragraph, second sentence.

<sup>28</sup> Cf. Section 338, third paragraph.

Section 381, third paragraph, provides that if the shipowner “[...] incurs liability for damages as a result of the loading, stowing, trimming, securing, discharging or delivery of the cargo [...]” the charterer shall indemnify the shipowner.<sup>29</sup> Indemnity in this case is based on the specific roles and allocation of costs that the parties have in the time charter. Thus, the charterer shall assume any liability incurred by the shipowner arising from the performance of these functions. Furthermore, in connection with Section 381, third paragraph, liability incurred by the shipowner due to stevedore liability (injuries) as per *The Jobst Oldendorff* arbitration award, also provide basis for indemnity. This will be explained in Chapter 2.

Finally, cases of joint and several liability of the carrier and sub-carrier, pursuant to the Maritime Code Section 287, third paragraph, allow recourse.<sup>30</sup> Nonetheless, these recourse situations exceed the aim of this dissertation and will not be analyzed.

#### 1.7 Indemnity under the Maritime Code Section 382, first paragraph, second sentence

As expressed above, Section 382, first paragraph, second sentence provides that “If the time carrier thereby incurs liability to the holder of the bill of lading in excess of the liability according to the chartering agreement, the time charterer shall hold the time carrier harmless.”

Section 382, first paragraph, second sentence, presents a legal hypothesis under which the time carrier (that will generally be the shipowner) incurs liability to a holder of a bill of lading, in situations where bills of lading contain liability in excess of the liability contained in the time charter. Consequently, the shipowner may have a right to recourse against the char-

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<sup>29</sup> Cf. Section 381, first and third paragraph.

<sup>30</sup> Falkanger, Thor, Hans-Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (3<sup>rd</sup> edn, Universitetsforlaget 2011), p. 359, 407.



terer to hold him harmless.<sup>31</sup>

As for an analysis of the conditions to request recourse under Section 382, first paragraph, second sentence, one can say the following:

First, however implicit in the language of Section 382, this indemnity requires a cargo claim (litigation, arbitration or settlement), where the shipowner is liable towards the cargo side.<sup>32</sup>

Second, the liability imposed to the shipowner in the cargo claim should be in excess of the liability terms in the time charter. The obligation of the shipowner to pay for liability to the cargo side will usually be imposed by application of mandatory rules (the Hague or Hague-Visby Rules, Hamburg Rules as enacted into domestic legislation). If the shipowner would also be held liable both under the time charter and mandatory rules, the mandatory rules dogma would not have the same weight; there would be no discrepancy between the charterparty and the bills of lading. Hence, there would be a situation of coordination of liability terms between the charterparty and applicable mandatory rules and the hypothesis under Section 382, first paragraph, second sentence, would not be applicable and/or indemnities subject to this provision would never be upheld.

Third, if the above-mentioned conditions are fulfilled, the shipowner would be allowed to look to the charterer for indemnity under Section 382, in order to recover what he paid in the cargo claim.

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<sup>31</sup> To hold harmless in English means to hold unharmed, to indemnify or to be considered not liable. In Norwegian the term would be comprised by the expression “holde skadesløs” that means literally, to hold harmless. However, the word indemnity comes from Latin, from *indemnus* and *indemnun* that also comes from *damnun* (or damage) plus the prefix “in”, meaning “no damage” or harmless. Also, the term indemnity in English is a noun that comes from the verb to indemnify.

<sup>32</sup> Cf. Sections 274 to 276 of the Maritime Code.

## 1.8 Indemnity provisions under English law

In England there are no statutory bases whatsoever for the indemnity situation that concerns the topic for analysis of the present dissertation. However, as one will see below, English courts have accepted indemnities in the charterparty context on two different bases, an express term in a charterparty and implied indemnities (as terms implied in fact).

Under English law, if the charter contains an express term for situations of inconsistencies between bills of lading and the charterparty, the indemnity will be construed as a contractual term. Common charterparty forms are very relevant in this context as well. Examples of time charter forms widely used in the industry are Shelltime, Baltime, NY Produce, etc. As explained below, these time charter forms contain express indemnity clauses for the case of liability arising from bills of lading. Hence, one sees no reason to reproduce the express wording of indemnity provisions provided by these standard forms.

In addition, in England, when there is no express term covering the situation, this is analyzed as an implied indemnity situation. English law solves contractual gaps as Norwegian law but in a different manner. Norwegian legal system uses default rules. English law implied terms, as per *The Moorcock*.<sup>33</sup> Then, an implied indemnity is not more than an implied term of the contract.

In particular, under English law implied indemnities foster contractual workability, inferring the intention of the parties based on different approaches (either, under the *business efficacy* test analysis, or, under the *reasonable bystander test* [or a “fly on the wall”]). In particular, in *The Moorcock*, Bowen LJ said in p. 68:

“An implied warranty, or as it is called a covenant in law, as distinguished

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<sup>33</sup> *The Moorcock* [1889] 14 PD 64; Jill Poole, *Contract Law*, (11<sup>th</sup> edn, Oxford 2012), pp. 213-214.

from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side.”<sup>34</sup>

In conclusion, as briefly presented, Norwegian and English laws generally offer similar solutions when analyzing indemnity provisions in charterparty trade. Particular answers to legal questions presented will be analyzed and compared in the following two Chapters.

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<sup>34</sup> *The Moorcock* [1889] 14 PD, p. 68.

## **2 INDEMNITY IN TIME CHARTERS UNDER NORWEGIAN AND ENGLISH LAW**

### **2.1 Introduction**

This Chapter aims to answer how implied indemnities have been understood, in particular, in time charters, pursuant to Section 382, first paragraph, second sentence of the Norwegian Maritime Code and under English law. References to Section 338 will be made when appropriate. Consequently, I have divided this part into two: Norwegian Maritime Codes, contrasted with their preparatory works and case law, on the one hand, and English law, on the other. Additionally, the wording in Sections 95 and 141 of the 1893 Code, and 338 and 382 of the 1994 Code, possess a declaratory nature. That is, these rules apply only if the parties have not agreed expressly anything to the contrary or have kept silence in the contract.

English law on the topic is based on a line of common law and maritime decisions that have developed solutions on indemnities in time and voyage charters context.

### **2.2 Norwegian Maritime Codes**

In order to answer mainly how above-mentioned indemnities have been understood in time charters in Norway, one has to start with two pieces of maritime legislation, the 1893 and 1994 Maritime Codes plus preparatory works. Nonetheless, the 1994 Code repealed the 1893 Code and this dissertation will focus on the current Code in force.<sup>35</sup>

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<sup>35</sup> Section 511 of the 1994 Maritime Code.

Reference to the 1936 preparatory works has been done due to the inclusion of time charters provisions, for the first time, within the 1893 Code.

In Norway, preparatory works are of great interest and their examination assist judges, practitioners and scholars when interpreting statutory provisions. Norwegian scholars expressed in this regard that “[...] the legislative history may demonstrate that a particular rule or term is to be understood in a certain way [...]”<sup>36</sup>

The 1893 Code and its legislative history maintain its importance today because in the 1994 Maritime Code the number of provisions on time charters in Chapter 14, was increased, nevertheless had only a “[...] few substantive changes in existing rules [...]”<sup>37</sup> Some of these changes had impact on the pertinent provisions applicable to indemnities that concern this research and will be analyzed in the present Chapter.

Research for this dissertation has showed that the legislative records of the Maritime Law Committee of 1893 and 1994 Codes do refer to the problems on indemnity clauses in time charters. Additionally, voyage charter and time charter indemnities share a common historical background and references to voyage charters provisions preparatory works and case law will be done.

Preparatory works of 1936 and 1993 refer to indemnity for liability incurred by the shipowner in cases of bills of lading containing greater liability conditions (or liability in excess) than the charterparty terms. In the 1936 preparatory works there is no reference to the operation of mandatory rules in the drafting history of Sections 95 and 141 of the 1893 Code, or how

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<sup>36</sup> Falkanger, Thor, Hans-Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (2<sup>nd</sup> edn, Universitetsforlaget 2008), p. 29.

<sup>37</sup> Falkanger, Thor, Hans-Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (2<sup>nd</sup> edn, Universitetsforlaget 2008), p. 417; NOU 1994: 36, p. 83.

mandatory rules may increase liability exposure of the shipowner in charters subject to Norwegian law due to their operation.<sup>38</sup> Preparatory works of 1993 refer to the mandatory rules operation but as an exception, that does not grant recourse.

In addition, this thesis has disregarded from analysis preparatory works pieces: (i) the IX Report of the Maritime Law Committee (“Innstilling IX fra Sjølovkomitéen”) of 21 December 1956 because has no interest for this article;<sup>39</sup> and, the NOU 1972: 11 (“Norges Offentlige Utredninger 1972: 11”) because it does not provide any substantial finding on time charter indemnities.<sup>40</sup>

### 2.3 The 1893 Code and preparatory works of 1936

First, as one may notice, the 1893 Maritime Code (“Sjøfartsloven av 20 juli 1893”) originally did not contain any rules on time chartering (“tidsbefraktning bestemmelser”). Only after 1938, Sections 141 to 150 on time charters were added. The most relevant provision of the 1938 amendment to the 1893 Code is Section 141, second sentence, because it deals with the indemnity situation due to issuance of bills of lading inconsistent with time charter terms. Moreover, Section 95 of the 1893 Maritime Code is relevant for current interpretation of Sections 338 and 382 of the 1994 Code.<sup>41</sup>

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<sup>38</sup> Ot. prp. nr. 23 (1937), pp. 1-23; see Susanne Moshuus, ‘Lastansvar I tidsbefraktningsforhold’, *Marlus* no. 193 (1992), p. 15.

<sup>39</sup> Justis og politidepartementet, *Innstilling IX fra Sjølovkomitéen*, Utkast med motive til lov om endring av reglene om befording av passasjerer og reisegods (sjøfartslovens kap. 6 (nytt m.m.)), Komitéen oppnevnt ved Kronprinsregentens resolusjon av 21. Desember 1956.

<sup>40</sup> Justis og politidepartementet, NOU 1972: 11, *Norges Offentlige Utredninger*, *Godsbefordring til Sjø*, Utkast med motive til lov om endring av reglene om befording av gods til sjøs (Innarbeidelse av “Haag-Visby-reglene” I sjøfartsloven kap. 5, m.m.); *Utredninger instilling X fra Utvalget til revisjon av sjøfartslovgivningen*. (Sjølovkomitéen).

<sup>41</sup> Ot. prp. nr. 23 (1937), pp. 1-23.

What does the 1893 Code, Section 141, second sentence provide? And, in particular, what did the 1936 Maritime Law Committee say about Section 141?

As for the first question, the 1893 Maritime Code, Section 141, second sentence, provides that

“The carrier is obliged to issue a bill of lading for the goods loaded with the conditions of carriage, which are customary in the particular trade. *If he incurs thereby increased liability, the charterer shall hold him harmless* (“skadesløs”).”<sup>42</sup> [Emphasis added.]

Second, the preparatory works of the 1936 Maritime Legal Committee (“Innstilling fra Sjølovkommisjonen, Oslo 7 mai.1936”) only provide some limited explanation, on the wording of Section 141, second sentence.

In these legislative records, there is no reference whatsoever to the problem that 25 years after was presented in *The Vestkyst I* case, i.e. the right of recourse of the carrier against the charterer considering the interaction and legal implications of mandatory rules (the Hague Rules). As said in Chapter 1, the indemnity claim of the shipowner in the aforesaid case was based both on Section 95 and an exclusion of liability clause contained in a Gencon voyage charter. However, these clauses have been understood as clauses providing a right to exclude liability but not to look for indemnity, i.e. serving a purpose only as a shield but not as a sword. As for Section 95, the Supreme Court disregarded it as a basis for indemnity because the shipowner liability in the cargo claim was a consequence of the operation of mandatory rules and not to greater liability in bills of lading. This thesis will elaborate further on this point.

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<sup>42</sup> The original text of Section 141 of the 1893 Maritime Code in Norwegian reads as follows: “Bortfrakteren er pliktig til å utstede konnossement for innlastet gods med de vilkår for befordringen som er sedvanlige i den pågjeldende fart. Pådrar han sig derved øket ansvar, skal befrakteren holde ham skadesløs.”

When the 1936 Maritime Law Committee elaborated on Section 141, second sentence made express reference to Section 95 of the 1893 Code. The Reports Committee read as follows:

“As the time charterer often sub-lets [sub-charters out] the ship or assumes responsibilities as carrier of general cargo, it is important for him to request that the carrier must issue a bill of lading with the conditions of carriage which are customary in the particular trade. This is accounted for in the draft bill. § 141, which, however, gives the carrier the right of recourse against the time charterer, if he incurs stricter liability in the bill of lading due to conditions different than he would have by the time charter, cf. on voyage charters § 95, third paragraph. See also the Dutch Law § 518 d and Carver sect. 161b [...]”<sup>43</sup> [Emphasis added]

One may wonder whether reference to “cf. on voyage charters Section 95, third paragraph and to Carver, means that indemnity in Section 141 should be construed by analogy.<sup>44</sup> A totally separate point is the question of mandatory rules that was not expressly addressed by the Committee as one may notice.

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<sup>43</sup> The original text in Norwegian of the “Motiver til utkast til lov om forandringer i sjøfartsloven in Innstilling fra Sjølovkommisjonen, Oslo 7 mai.1936, femte kapitel”, p. 68, reads as follows: “Da tidsbefrakteren ofte frembortfrakter skibet eller overtar stykkgodsbefordring, er det av betydning for ham å kunne kreve at bortfrakteren skal utferdige konnossementer med de vilkår for befordringen som er sedvanlige i den pågjeldende fart. Hertil er der tatt hensyn i utk. § 141, som imidlertid gir bortfrakteren rett til regress overfor tidsbefrakteren, såfremt han ved konnossement pådrar sig et strengere ansvar enn han vilde ha efter tidscertepartiet; jfr. om reisebefraktning § 95, 3dje ledd. Se også den hollandske lov § 518 d og Carver sect. 161b. Efter omstendighetene vil innskrenkninger i regressretten kunne følge av avtalen; jfr. § 71. Se også bemerkningene til utk. II § 5. Det er unødvendig å si i loven at tidbefrakteren ikke kan forlange konnossement som med hensyn til datering, beskrivelse av godset eller i andre henseende strider mot det virkelige forhold.”

<sup>44</sup> Carver, *Carriage by Sea* (12<sup>th</sup> edn Stevens & Sons 1971) at p. 374, refers to the implied indemnity by the charterer “[...] which impose on the shipowner a greater obligation by their conditions than that imposed by the charterparty [...]”. He also refers to *Krugel v. Moel Tryvan Ship Co.* and *Elder, Dempster v. Dunn*.



For the 1936 Committee these two recourse situations (in Sections 95 and 141) are based on a common problem that may affect shipowners both under voyage and time charters, i.e. greater liability for issuance of bills of lading containing greater liability terms than the charter-parties.

Nonetheless, what is the actual meaning of the expression “increased liability” in Section 141? Surprisingly, the Maritime Law Committee did not answer. The Committee only made a reference to the expression “stricter liability” (or “strengere ansvar” in Norwegian). Thus, that would be the content of the expression “increased liability” in Section 141. But if one goes deeper into the implications, “increased” and “stricter” do not necessarily match.

What is the problem with these two expressions?

First, the expression “increased liability” in Section 141 would imply bills of lading with terms exposing the carrier to enlarged, expanded or greater liability.

Second, the wording in the 1936 Reports “stricter liability” would mean harsher, closer, narrower liability in bills of lading terms compared to the terms of the time charterparty.

A simple exercise of logic shows that stricter/narrower/closer does not mean increased/enlarged/expanded.

Therefore, as one may see, from the analysis above, there is some ambiguity that may trigger some sort of conceptual resistance between both expressions.

Another issue is to answer the question whether the expression “increased liability” in Section 141 regarding bills of lading also comprehends “mandatory rules”.

If yes, as is usual, bills of lading terms would be more likely to be interpreted in order to expose the shipowner to increased cargo liability. Therefore, this inconsistency between the charter and bills of lading would entitle the shipowner to look for indemnity. But if the own-

er's indemnity recourse against the charterer is denied due to the operation of mandatory rules, then the charterer would be released from liability that perhaps should fall on his side due to the particular role he plays in the time charter or in accordance with the express agreement of the parties. Then the risk allocation system that a time charter may contain would be shifted from one side to the other. On the other hand, if the expression does not include mandatory rules that permeate to the charter, the shipowner notwithstanding being liable towards holders of bills of lading may look to the charterer for indemnity. Thus, the problem is to leave mandatory rules operational in one level, that is the cargo claim and not to permeate it to the time charter level.

Furthermore, the 1936 preparatory works on Section 141, second sentence, made no express reference to the distinction between express or implied indemnities that is developed by English law. Implied indemnities in English law are based on the observance of charterer's orders (employing the vessel) that cause a loss to the shipowner, however, in absence of express terms. As referred above, express indemnities are those indemnity provisions explicitly agreed by the parties, e.g. Shelltime, Clause 13.

#### 2.4 The 1994 Maritime Code and preparatory works of 1993

Norwegian Maritime Code, Section 382, first paragraph, second sentence provides that

“If the time carrier thereby incurs liability to the holder of the bill of lading in *excess of the liability* according to the chartering agreement, the time charterer shall hold the time carrier harmless.” [Emphasis added]

As for the wording in Section 382, one would have expected a better formulation on this type of indemnities, due to existing developments on the matter at the time it was drafted.<sup>45</sup> However, one must concede that some linguistic changes were made to this provision.

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<sup>45</sup> Cf. Ot. prp. nr. 55 om lov om sjøfarten (sjøloven), pp. 57 and 62.

The new mandatory rules exception to Section 382, first paragraph, second sentence, was formulated in the 1993 preparatory works.<sup>46</sup> For the particular analysis of indemnity under Section 382, please refer to previous part 1.7 in this dissertation.

In addition, preparatory works on Section 329 on voyage charter indemnities, in its third paragraph, (current Section 338, third paragraph) referred to former Section 95 of the 1893 Code. The 1993 Committee expressed its view, as follows:

“The third paragraph [of draft Section 329, currently Section 338] is consistent with the Maritime Code § 95, fourth paragraph. The provision gives the carrier recourse against the charterer if the bill of lading is issued with different conditions than the charter agreement and the carrier for that reason incurs a larger liability than it has pursuant to the chartering agreement. *It is, however, only increased liability arising from the terms of the bill of lading that provides recourse. Increased liability resulting from mandatory rules does not provide recourse.* This is consistent with current law, see the Supreme Court judgment in The Vestkyst I case, which is found in the ND 1961 page 325, and the arbitral award of Jobst Oldendorff case, which is reproduced in ND 1979 page 364.”<sup>47</sup> [Emphasis added]

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<sup>46</sup> See NOU 1993: 36, Godsbefordring til sjøs Utredning XV fra utvalget til revisjon av sjøfartslovivningen (Sjølovkomiteen), Avgitt til Justis – og politidepartementet, november 1993, pp. 68 and 88.

<sup>47</sup> The original text in Norwegian reads as follows: “Tredje ledd er i samsvar med sjøloven § 95, fjerde ledd. Bestemmelsen gir bortfrakteren regress mot befrakteren dersom det utstedes konnossement med andre vilkår enn i befraktningsavtalen og bortfrakteren av den grunn påføres større ansvar enn denne har etter befraktningsavtalen. Det er imidlertid bare økt ansvar som følge av vilkårene i konnossement som gir regress. Økt ansvar som følge av tvingende regler gir ikke regressen. Dette er i samsvar med gjeldende rett, jf Høyesteretts dom i Vestkyst I saken, som er gjengitt i Nordiske Domme i Sjøfartsanliggender 1961 siden 325, og voldgiftsdommen i Jobst Oldendorff saken, som er gjengitt i Nordiske Domme i Sjøfartsanliggender 1979 s. 364.”

Furthermore, as for the 1993 preparatory works on Section 373 (current Section 382), reports have not added anything new to the issue on indemnity recourse due to issuance of bills of lading with “liability in excess”. However, the Committee referred to Section 141 and perhaps “stepped” on the same stone (cf. reference to discussion above). Then, one may reproduce again the same observations made when analyzing Section 141 and the 1936 preparatory works. Thus, one sees no need to repeat extensively this part of the preparatory works.<sup>48</sup>

Professor Solvang expressing his view on this particular issue, said “[...] indemnity under Section 382 is [also] restricted to increased liability imposed by the terms of the bills of lading, not by mandatory liability rules (e.g. Hague-Visby as enacted by national legislation). Moreover, Section 382 corresponds to Section 338 third paragraph regarding voyage chartering.”<sup>49</sup> His idea refers to the express wording for indemnity under Section 382 (cf. 338) and to the lack of reference to the aforesaid exception based on mandatory rules.

Additionally, the 1993 Committee when elaborating on Section 373 did not consider the “function” of the parties to time charters and the wide range of indemnity claims that may differ from those under a voyage charter, e.g. issuance of bills of lading, which is a function executed solely in the interest of the charterer. The Committee could have done so by simply referring to the discussion on Section 372 in NOU 1993: 36.<sup>50</sup> The express wording in Sec-

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<sup>48</sup> NOU 1993: 36, p. 88, in Norwegian reads as follows: “Første ledd tilvarer sjøloven § 141...I slike tilfelle kan tidsbefrakter kreve at det utstedes konnossementer som kan medføre et *strengere ansvar* for bortfrakteren som transportør enn ansvar som han har i certepartiforholdet. Tidsbortfrakter må således ta risikoen for at tidsbefrakter klarer å oppfylle regressansvaret. Bestemmelsen er i overensstemmelse med certepatitpraksis.” [Emphasis added]. It is important to say again that the preparatory works in this regard do not deny the possibility of expressly agreeing an indemnity for stricter liability terms in the bills of lading, e.g. Shelltime, Clause 13.

<sup>49</sup> See footnote nr. 19 in Trond Solvang, ‘The English doctrine of indemnity for compliance with time charterers’ orders – does it exist under Norwegian law?’ *Marlus* nr. 419 (2012), p. 20.

<sup>50</sup> NOU 1993: 36 at p. 88, on Section 372 (current 381) in Norwegian reads as follows: “Utgangspunktet er at dersom ansvaret er oppstått under utførelse av en av de funksjoner

tion 381, first paragraph states that the “[...] charterer shall provide and pay for the reception, loading, stowing, trimming, securing, discharging and delivery of the cargo [...]” and Section 381, third paragraph, states a basis for indemnity for consequences arising from those specific functions, imposing liability upon the shipowner. Why bills of lading would be then excluded from the same solution if they were issued performing a function in the interest of the charterer? Perhaps the charterer should finally provide for liabilities arising as a consequence of the issuance of bills of lading.<sup>51</sup>

In other words, one may wonder if the above-mentioned interest of the charterer when issuing bills of lading in accordance with Section 382, first paragraph, second sentence, may be analyzed similarly to the functions and indemnity under Section 381.

Likewise, the 1993 Committee when analyzing current Section 382 did not explain clearly the implications of the applicability of mandatory rules to time charter indemnities. However, the Committee was strongly influenced by *The Vestkyst I* decision. That justifies the Committee’s interpretation offered for the case of applicability of mandatory rules in connection with Section 338, thus, refusing grounds for indemnity in case of discrepancy in bills of lading resulting from the application of mandatory rules.

As referred to in Chapter 1, Section 322, third paragraph refers to the specific rule contained in Section 338, on the issuance of bills of lading with inconsistent terms. Generally, Section 322 makes Chapter 13 applicable to a number of chartering situations, e.g. domestic Norwe-

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tidsbefrakter har, vil ansvaret hvile på ham [...]” In English means “The principle is that if the liability has arisen during the execution of one of the functions the time charterer has, the responsibility will rest on him.”; on the functional argument in time charters see NOU 1993: 36, pp. 87-88; Susanne Moshuus, ‘Lastansvar I tidsbefraktningssforhold’, *Marlus* no. 193 (1992), p. 23. References are made to Section 139, first paragraph (current Section 381).

<sup>51</sup> Cf. Section 382 and Section 381, first paragraph, first sentence, on loading and discharging, reads as follows: “The time charterer shall provide and pay for the reception, loading, stowing, trimming securing, discharging and delivery of the cargo.”

gian chartering, inter-Nordic chartering and chartering between Norway and the situations covered by numbers 1 to 5, in Section 252. Notwithstanding, again, Section 322, third paragraph, solely applies between the carrier, as defined in Section 251, and the holder of a bill of lading (Cf. Section 325). Strangely, Section 322 does not provide that is applicable to the situation covered by Section 382, first paragraph, second sentence.

Finally, the Committee did not refer to indemnity cases based on contracts containing *express* indemnity, such as Shelltime Clause 13, or even to voyage charters containing such indemnities, and their conceivable interaction with mandatory rules under Chapter 13.

## 2.5 Norwegian case law

What does Norwegian case law add in this regard? This thesis will elaborate on two Norwegian cases: *The Vestkyst I* case and *The Jobst Oldendorff* arbitration award.

First, *The Vestkyst I*, however, a decision on a Gencon voyage charter, reveals the analysis of the Norwegian Supreme Court that decided, on the right of indemnity of the shipowner against the charterer due to liability imposed upon the first. The cargo receiver that was not the charterer and based on mandatory rules requested liability in the cargo claim.<sup>52</sup>

In this case, the shipowner of the vessel *Vestkyst I* was required to pay compensation for shortage in a cargo of aluminum bars. Consequently, the shipowner looked for indemnity

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<sup>52</sup> Gencon voyage charter forms in the 1960s, and in particular in this case, did not contain any express indemnity clause in case the carrier signed inconsistent bills of lading. The Court found that this charter, from 1915, however revised after the adoption of the Hague Rules did not contain an express indemnity. This form only provided the voyage carrier with an exclusion of liability clause, see Clauses 2 and 9. Exclusions clauses are generally strictly construed. The Norwegian Supreme decision is aligned with the English decision *Ben Line Shipping Co. (Pt.) Ltd. of Singapore v. An Bord Bainne of Dublin (The C. Joyce)*, Com. Ct. (Bingham J.) - 4 March 1986.

against the charterer, in accordance with Clause 2 of the charterparty. Mosjøen Aluminium, also the shipper, sold the consignment CIF to English purchasers and chartered the vessel, *The Vestkyst I*, on a Gencon voyage charter form to carriage the cargo. Due to shortage the shipowner was required to pay compensation to the cargo receiver, protected by the Hague Rules regime, as enacted into domestic legislation. The Supreme Court expressed that the only legal question in this case was to determine whether the owner was entitled to claim indemnity against the charterer for the compensation paid by the owner to the cargo receiver. The legal basis of the shipowner's claim was comprised by the wording of Clauses 2 and 9 of the Gencon voyage charter and Section 95 of the 1893 Norwegian Maritime Code. Charterer claimed that there was no sufficient basis for indemnity in the particular case and succeeded.

The decision of the Supreme Court decision was based on the following points:

First, for the Court, Clause 2 of the charter, "[...] extensively limits the liability of the shipowner for loss of or damage to [...]”<sup>53</sup> cargo, but does not contain any special reference to an indemnity against the charterer when a third party requires compensation from the owner in case of shortage or damage of the type the owner has excepted liability in the charter. Thus, under Norwegian law, exclusion of liability clauses must supplemented by an express indemnity, as its contractual counter-balance.

Second, the Court also found that

“The limitation of liability provision in Clause 2 is quite extensive and results in a severe limitation of liability which the owner would otherwise have pursuant to the Hague Rules and the provisions of the NMC. It is natural to interpret such a limitation of liability strictly, and not interpret into its passive exemption from liability a

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<sup>53</sup> See ND 1961. 325 NH (Vestkyst I); for a translated version to English of this decision of the Norwegian Supreme Court, please see Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 14.

positive right of indemnity, in the absence of definite support for this in its wording.”<sup>54</sup>

Third, the Court established that Clause 9 of the charter, together with Clause 2, does not provide any contractual basis to the owner to claim indemnity against the charterer “[...] in the event a bill of lading is issued which has the effect of increasing the liability of the owner compared to that set out in the limitation liability provisions contained in the charterparty.”<sup>55</sup> The Court also found, based on a book from Jantzen, that this could be easily altered by express agreement of the parties in the charter.<sup>56</sup>

Fourth, the Court also expressed that

“Further authority for the view that are grounds for a claim may be found in the fact that, pursuant to Clause 9 of the charterparty and § 95 of the NMC, the ship’s master is obliged to issue a bill of lading. The charterer has the option to transfer his obligation to third parties and thereby impose on the shipowner liability under the bill of lading pursuant to the mandatory provisions of the Act on Bills of Lading, thereby increasing the shipowners liability far in excess of the liability it has pursuant to the provisions of the charterparty.”<sup>57</sup>

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<sup>54</sup> See Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 15.

<sup>55</sup> The Court’s reference to Johs Jantzen, *Godsbefordring til sjøs: befraktning* (2<sup>nd</sup> edn Fabritius 1952); see Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 16.

<sup>56</sup> See Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 15.

<sup>57</sup> See Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 15.



Fifth, the Court said that it has not been proved that “[...] it is the practice in this country [Norway] or any other to construe the Gencon charterparty to the effect that it provides the owner with a right of indemnity against the charterer in cases such as the present case, despite the fact that such instances must arise regularly.” This particular point finds its parallel case in the English decision *The C. Joyce* (analyzed below).

From the above, it seems that the only clear explanation, that has to be tested, to prevent the applicability of the mandatory rules dogma, in order to protect shipowner’s rights to indemnity under Norwegian law, is an express indemnity clause together with an exclusion of liability clause, or at least this is what the Supreme Court seems to suggest in *The Vestkyst I* by paraphrasing Jantzen. Professor Solvang seems to have taken a similar but not equal approach in the context of voyage charters.<sup>58</sup>

As said, in the aftermath of *The Vestkyst I*, further analysis came first from arbitrator Brækhus when rendering the award on *The Jobst Oldendorff* arbitration.<sup>59</sup>

What did the *The Jobst Oldendorff* say on the matter? This arbitration award is a time charter indemnity arbitration based on NY Produce form and is relevant because as a matter of prin-

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<sup>58</sup> See Trond Solvang, ‘Bills of lading issued under voyage charterparties: review of legal position under English and Scandinavian law – practical advice on how to secure shipowners’ right of indemnity from charterers for liabilities incurred under bills of lading’ in *Nordisk Medlemsbladet* (2003), pp. 5960-5967.

<sup>59</sup> See ND 1979.364 NV (*The Jobst Oldebdorff*); see the English translation in *Maritime Law Case Collection* (JUS 5401/5402), *Maritime Law*, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 33, that reads “[...] the fact that the liability which gave rise to the right of indemnity in *The Vestkyst I* case was a Hague Rule liability, clearly shows that an indemnity claim against the shipper was refused. This aspect of the matter was not included in the pleadings before the Norwegian Supreme Court, but problems would no doubt have arisen if the right of indemnity had been admitted; indemnity in this situation would have meant that a liability which, according to the mandatory provisions of the Hague Rules, is to be borne by the shipowner, would have been passed onto the cargo-owner, contrary to the compromise of interests provided for by the Hague Rules.”

ciple, picked-up some of the points left unexplained by *The Vestkyst I* case in the 1960s.<sup>60</sup> Nonetheless, the arbitration did not solve a situation of shortage or damage. It dealt with an indemnity claim due to injuries suffered by a longshoreman. Also, the case that triggered the indemnity, was decided in first instance in the US, in accordance with special applicable mandatory rules on stevedore liability but not under the American Carriage of Goods by Sea Act.<sup>61</sup>

As said, this arbitration involved an indemnity claim by the shipowner of the M/V Jobst Oldendorff against the charterer, on the other, based on NY Produce, due to compensation paid to a stevedore that suffered injuries while unloading the vessel in Stapleton, USA. The American court obliged the shipowner to pay compensation to the injured longshoreman.

Considering the factual scenario, the arbitration elaborated on various legal questions, i.e. (A) Are there grounds for a claim for indemnity? (B) Should a right of indemnity be denied in any event due to the fact that negligence is proven on the part of the ship's hands? (C) Interests and costs. For the aim of this article only points (A) and (B) are relevant.

As for point (A), arbitrator Brækhus presents different situations, which are considered indemnity situations under general contract law, but not necessarily applicable to indemnity recourse in chartering due to issuance of inconsistent bills of lading: (1) joint and several liability; (2) the *negotiorum gestio* situation where a contracting party has "[...] incurred expenses or has been held liable to a third party in some respect which, in terms of the contract, it is the responsibility of the other contracting party to arrange and pay for"<sup>62</sup>; (3) "The situa-

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<sup>60</sup> Jens Vogth-Erikse, 'Regress I certepartiforhold', *Marlus* no. 53 (1980), p. 20-21.

<sup>61</sup> Falkanger, Thor, Hans-Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (3<sup>rd</sup> edn, Universitetsforlaget 2011), p. 414.

<sup>62</sup> ND 1979.364 NA (*The Jobst Oldendorff*); see ND 1979.364 NV (*Jobst Oldebendorff*); see the English translation in Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 31.

tion where a contracting party assumes liability towards a third party for performance for which it is responsible pursuant to the contract but where [...] the parties [...] agreed [...] to exclude that party's liability [...]"<sup>63</sup> As said, perhaps professor Brækhus' view of indemnity situations in Norwegian private law is quite broad for indemnity in charter trade.

From the arbitration award, it is particularly interesting point (A) (3) above because professor Brækhus develops the implications of *The Vestkyst I* case in the charter context as follows:

"The precedents applicable to the category of indemnity claims described in point 3 are not relevant to this case; in reality the situation in this cases is quite different from the other cases. Of particular interest [...] is the fact that it relates to an interpretation of a specific, and very extensive, limitation of liability clause in voyage charterparty, where the mandatory provisions of the Hague Rules applied, so that definite conclusions that cannot be drawn from this judgment in respect of rights of indemnity in charterparty cases. *The Vestkyst I* case was a dispute between a shipowner and a voyage charterer, *who was also the shipper*, i.e. a case between a shipowner interests and cargo interests."<sup>64</sup> [Emphasis added]

From the excerpt above one may wonder if mandatory rules aim to protect charterers with overlapping roles (e.g. as the shipper but not as the receiver). In accordance with Section 251 of the Maritime Code, the shipper is "[...] the person who delivers the goods for carriage".<sup>65</sup> In addition, pursuant to Section 294, first paragraph, the shipper is entitled to request bills of lading and thus may be protected by mandatory rules, unless he transfers the bills of lading

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<sup>63</sup> ND 1979.364 NA (*The Jobst Oldendorff*); see ND 1979.364 NV (Jobst Oldebdorff); see the English translation in Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 33

<sup>64</sup> ND 1979.364 NA (*The Jobst Oldendorff*); see ND 1979.364 NV (Jobst Oldebdorff); see the English translation in Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 33

<sup>65</sup> Cf. Section 321 of the Maritime Code.

and conditions for mandatory rules protection do not seem to be present any longer. In a CIF sale, for example, also as in *The Vestkyst I* case, i.e. a contract that requires the seller to arrange the cargo transportation, the charterer was the seller and the shipper, but he transferred the bills of lading to an English buyer. In general, the buyer may be a consignee, endorsee or receiver that will not need to be the charterer, when he has transferred the bills of lading.<sup>66</sup> In *The Vestkyst I* the charterer was the shipper but not the receiver, therefore, conditions for protection from mandatory rules were not present any longer at the moment the charterer transferred the bills of lading. Had the charterer been the shipper and the receiver at the same time, protection by mandatory rules would have justified the rejection of the indemnity claim. However, one should agree with *The Jobst Oldendorff* in the sense that the decision *The Vestkyst I* is difficult to be conceived as a general solution applicable to time charters as well.

The arbitrator excellently expressed that in *The Vestkyst I* case

“[...] the fact that the liability which gave rise to the right of indemnity [...] was a Hague Rule liability, clearly shows that an indemnity claim against the shipper was refused. This aspect of the matter was not included in the pleadings before the Norwegian Supreme Court, but problems would no doubt have arisen if the right of indemnity had been admitted; indemnity in this situation would have meant that a liability which, according to mandatory provisions of the Hague Rules, is to be borne by the shipowner, would have been passed onto the cargo-owner, contrary to the compromise of interests provided for by the Hague Rules.”<sup>67</sup>

One may reasonably wonder if the issue presented by professor Brækhus paraphrasing the Norwegian Supreme Court case should be analyzed in a different manner. For example, con-

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<sup>66</sup> Thor, Hans-Jacob Bull & Lasse Brautaset, *Scandinavian Maritime Law: The Norwegian Perspective* (3<sup>rd</sup> edn, Universitetsforlaget 2011), p. 259.

<sup>67</sup> ND 1979.364 NA (*The Jobst Oldendorff*); see the English translation in Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 33.

sidering that an indemnity against a charterer, who is also the shipper, should not be refused because the contract expressly provides that, making the Hague-Visby liability to be finally borne by the charterer. This is not illogical or outrageous. This solution at least should be theoretically allowed under the principle of contractual freedom. Furthermore, it has not expressly been forbidden by the 1994 Code or its preparatory works.

As for point (B), on the degree of negligence, the jury's decision or any other relevant element considered in this regard under American law had no impact under Norwegian law. The arbitrator said that the "fact that the vessel was held liable to the injured port worker must be regarded as the effect of the "[...] particular liability risk associated with discharging in American ports [...]" In the private contractual relationship between the vessel, the shipowner and the time charterer, this risk is for the latter."<sup>68</sup> The aforementioned quotation is the core of the *functionality* argument under Norwegian law and could be applied to a myriad of indemnity situations in time charters.

In conclusion, after an evaluation of legal provisions, preparatory works, case law and doctrine, one is left in a hesitant position as to the general application of the mandatory rules dogma. The mandatory rules dogma may be like a *complex legal artifact*, but likely to be applicable to time charters. Hence, this doctrine of "increased liability resulting from mandatory rules does not provide recourse" has to be compared with other experiences from Hague or Hague-Visby Rules States. Next Part 2.6 deals with the English approach on indemnities.

## 2.6 The English approach

What does the English approach involve?

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<sup>68</sup> See ND 1979.364 NV (*The Jobst Oldebodoff*); see the English translation in Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 35.

English law in the chartering context from a formal point of view classifies indemnities as express or implied. Voyage charters decisions also apply as a matter of principle to time charter cases. Furthermore, from a substantive point of view, English law distinguishes between the following situations: (i) indemnity situations where bills of lading expose the owner to liability different to the charter terms; (ii) indemnity against consequences of delivering cargo without producing bills of lading; (iii) port risks; (iv) cargo risks; and, (v) navigation risks.<sup>69</sup> As said above, this dissertation focuses on implied indemnities and on point (i) but cross-references to (ii) will be done to illustrate a legal point below.

As referred, English law recognizes a far-reaching right of indemnity in time charters. This approach provides, “[...] loss or liabilities incurred in complying with the charterer’s orders originates from two distinct sources. One source is the contractual terms [...] however, the owner’s right to an indemnity was sufficiently identified with the relationship of owner that it applied in the absence of such a term.”<sup>70</sup>

*Scrutton* (1886) included a reference to an express indemnity in a time charterparty, that reads as follows:

“[...] that the captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; *and the charterers hereby agree to indemnify the owners from the consequences or liabilities that may arise from the captain signing bills of lading, or in otherwise complying with the same.*”<sup>71</sup> [Emphasis added]

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<sup>69</sup> David Foxton, ‘Indemnities in Time Charters’ in Rhidian Thomas (edit.), *Legal Issues Relating to time Charters* (Informa 2008), p. 93.

<sup>70</sup> David Foxton, ‘Indemnities in Time Charters’ in Rhidian Thomas (edit.), *Legal Issues Relating to time Charters* (Informa 2008), p. 93.

<sup>71</sup> *Scrutton*, (cited Foxton D., 2008, p. 93), *Charterparties and Bills of Lading* (Sweett & Maxwell 1886), p. 247.

The extract refers generally to consequences or liability that may arise from the captain signing bills of lading. The term consequences may entail costs, penalties and liability means responsibility, i.e. for cargo damage, shortage or other bills of lading irregularities. One may see that there is no reference to a sort of “increased liability”, “liability in excess” or “stricter liability” as under Norwegian law.

Express indemnities are also present in modern forms of time charters. For example, NY Produce 1993 form Clause 30 (b) provides “All bills of lading or waybills shall be without prejudice to this Charterparty and the Charterers shall indemnify the Owners against all consequences or liabilities which may arise from *inconsistency* between this Charterparty and any bills of lading or waybills signed by the Charterers or by the master at their request”.<sup>72</sup> [Emphasis added]

The expression “inconsistency” in NYPE Clause 30 (b) is sufficiently wide because it may cover situations in which the owner’s liability may be also subject to mandatory rules that may have an impact on shipowner’s general need of coordination of liability terms in charters and bills of lading.

As for implied indemnities, it has been said that these are firstly based “[...] on a line of common law cases arising outside the shipping context in which a promise to indemnify would be implied in certain circumstances when one party acted on the directions or express instructions of another”.<sup>73</sup> One should also bear in mind what has been stated on *The Moorcock* above (as per Bowen LJ).

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<sup>72</sup> See NYPE 1993, Clause 30 (b), lines 311-314.

<sup>73</sup> David Foxton, ‘Indemnities in Time Charters’ in Rhidian Thomas (edit.), *Legal Issues Relating to time Charters* (Informa 2008), p. 94; see (cited in Foxton D., 2008, p. 94) *Adamson v Jarvis* (1827) 4 Bing 66; *Humphrys v Pratt* (1831) 5 Bli NS 154; *Betts v Gibbins* (1834) 2 Ad & E 57; *Toplis v Grane* (1839) 5 Bing NC 636.

The implied indemnity doctrine has been well explained in 1875 in *Dugdale v Lovering*. The facts are as follows: the plaintiff suffered losses due delivery certain trucks (those were the defendant's instructions), which were in his possession. Delivery took part based on defendant's instructions. Then the actual owner of the trucks, i.e. K.P. Colliery, sued the plaintiff for damages. Thus, the plaintiff looked at the defendant claiming an indemnity, which was not expressly recorded in an agreement. The case was for the plaintiffs.<sup>74</sup>

A first attempt to bring into line owner's indemnity claims in the maritime context following *Dugdale v Lovering* was the decision on a voyage charter indemnity, in *Moel Tryvan Ship Co v Kruger & Co*, where bills of lading issued by the charterer exposed the owner to greater liability than the liability terms in the voyage charter.<sup>75</sup> In particular, the charterparty requested "[...] the owner to sign bills of lading *without prejudice* of the charterparty"<sup>76</sup> [Emphasis added]. One may argue that to sign bills of lading "without prejudice to the charterparty" is a rather general obligation, but from a foreseeability perspective, bills of lading may be presented either containing more or less stringent terms than the charter. Thus, if discrepancy arises imposing major liability upon the charter, an indemnity will find its reason. Foxton made a general comment on this case and other early cases in which chartering indemnities were viewed as a legal figure between breach of contract, indemnity or both.<sup>77</sup> Consequently, we can say that English courts were not crystal clear in distinguishing whether indemnity

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<sup>74</sup> *Dugdale v Lovering* (1875) 10 CP 196 (cited in Foxton D., 2008, p. 94). The relevant part of this decision reads as follows: "We think this evidence brings the case before us within the principle laid down in *Betts v Gibbins* (1834) 2 Ad & E 57, *that when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yes if such an act is not apparently illegal in itself, but is done honestly and bona fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof.*" [Emphasis added].

<sup>75</sup> [1906] 2 KB 792 (in Foxton D., 2008, p. 94, footnote 5).

<sup>76</sup> David Foxton, 'Indemnities in Time Charters' in Rhidian Thomas (edit.), *Legal Issues Relating to time Charters* (Informa 2008) p. 94; [1907] AC 272.

<sup>77</sup> *Elder Dempster & Co v C G Dunn & Co* (1909) 15 Com Cas 49.



claims or breach of contract claims presented any substantial differences in their analysis.<sup>78</sup> One may also distinguish between remedy for breach and indemnity; at least theoretically speaking, this is relevant for causation and foreseeability (remoteness) purposes.

An indemnity is an obligation to “[...] hold the shipowner harmless against particular losses or liabilities caused by the compliance with the charterer’s orders.”<sup>79</sup> Therefore, “the cause of action accrues [...]”<sup>80</sup> when the liability for the indemnity has been established, and not from the date of the charterer’s order.<sup>81</sup>

Recovery of damages due to breach of contract is available as a right for the non-breaching party “[...] to be put into the position it would have been had the contract been performed as agreed”<sup>82</sup> (*restitutio*) and damages “[...] are to be assessed at the time the breach (or when the loss is suffered), which usually occurs at the time when the performance became due.”<sup>83</sup>

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<sup>78</sup> Trond Solvang, ‘Bills of lading issued under voyage charterparties: review of legal position under English and Scandinavian law – practical advice on how to secure shipowners’ right of indemnity from charterers for liabilities incurred under bills of lading’ in Nordisk Medlemsbladet (2003), p. 5961.

<sup>79</sup> David Foxton, ‘Indemnities in Time Charters’ in Rhidian Thomas (edit.), *Legal Issues Relating to time Charters* (Informa 2008), p. 102.

<sup>80</sup> David Foxton, ‘Indemnities in Time Charters’ in Rhidian Thomas (edit.), *Legal Issues Relating to time Charters* (Informa 2008), p. 102.

<sup>81</sup> *The Caroline P* [1984] 2 Lloyd’s Rep 466.

<sup>82</sup> *Robinson v Harman* (1848) Ex 850. This case established the general rule on compensation in money for the loss of bargain due to breach of contract, as per Baron Parke at p. 855.

<sup>83</sup> Jill Poole, *Contract Law*, (11<sup>th</sup> edn, Oxford 2012), p. 341; *Milangos v George Frank Textiles Ltd* [1976] AC 443. This case answered the question on which particular date a debt has to be paid under a foreign currency (Swiss francs). The Court decided to fix it on the date of conversion of the debt to the foreign currency. The general rule, the date of breach, was prejudicial to George Frank due to constant currency variations.

The general rule on causation is not to award compensation for losses, which were not caused by the breach of contract.<sup>84</sup>

In addition, as for the extent of damages, the doctrine of remoteness would not operate as a general rule in the indemnity context (as per Foxton).<sup>85</sup> One may wonder if this was the solution followed by *The Eurys* in contrast with *Hadley v Baxendale*.<sup>86</sup>

First, in *The Eurys*, at the Appeals Court, it was decided that the indemnity was *linked* to the breach of charter Clause 36 (that contained an obligation for the owner to make him responsible for non-compliance or delays of charterer's orders) and if the case concerned an indemnity, was particularly due to breach of contract. Thus, foreseeability test would be a necessary part of the assessment of indemnities as well.

Second, in *Hadley v Baxendale*, the starting point of the *remoteness* test in a situation of breach of contract is to award damages (as per Alderson B)

“[...] which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, [...] for such breach, of contract itself, or such as may reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”

Professor Solvang has examined the above issues under Norwegian and English law, on causation and foreseeability.<sup>87</sup>

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<sup>84</sup> On causation (a question of fact) and contributory negligence and other contributory factors, see Jill Poole, *Contract Law*, (11<sup>th</sup> edn, Oxford 2012), p. 345.

<sup>85</sup> David Foxton, 'Indemnities in Time Charters' in Rhidian Thomas (edit.), *Legal Issues Relating to time Charters* (Informa 2008), p. 102.

<sup>86</sup> [1988] 1 Lloyd's Rep 351; *Hadley v Baxendale* (1854) 9 Exch 341.

At this stage one should continue with the main legal issue of this part of the dissertation, i.e. the understanding of indemnities under English law due to issuance of bills of lading containing terms exposing the owner to greater liability.

As referred above, *Dugdale v Lovering* also seems to have been accepted and reaffirmed in the maritime law context in *Strathlorne Steamship Co v Andrew Wier & Co*. In this case the representatives of the charterer ordered the master to discharge shipment “[...] without production [...]” of the necessary bills of lading. Then the cargo side successfully obtained his claim towards the owner. Consequently, the owner looked for indemnity based both on “[...] common law and the express terms [...]” of the time charter. The arbitration, in the first instance decided to grant the indemnity on the two bases and the Appeals Court confirmed the latter.<sup>88</sup>

Another remarkable case as referred above is *The C. Joyce*, however another Gencon voyage charter dispute and it finds its parallel in the Norwegian case *The Vestkyst I*.

The legal question in *The C. Joyce* was to determine whether or not there was an implied indemnity in a particular exclusion of liability clause (as in *The Vestkyst I*). Particular solutions under English and Norwegian law surprisingly coincide but the indemnity in *The C. Joyce* was refused based on a rather different rationale, i.e. foreseeability. Furthermore, the English court did not consider the application of mandatory legislation as such in its decision.<sup>89</sup>

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<sup>87</sup> Trond Solvang, ‘The English doctrine of indemnity for compliance with time charterers’ orders – does it exist under Norwegian law?’ *Marlus* n. 419 (2012).

<sup>88</sup> [1934] 49 Lloyd’s L Rep 306, p. 311 (in Foxton D., 2008, p. 95); [1934] 50 Lloyd’s L Rep 185.

<sup>89</sup> *The C. Joyce* [1986] 2 Lloyd’s Rep 285; for the discussion on *The Vestkyst I* please refer to the relevant paragraphs above.

As for the facts, *The C. Joyce* involved an amended Gencon voyage charter form that contained an extensive exclusion in Clause 2, in benefit of the owner, and a rider clause in favor of the charterer. The purpose of the rider clause was to regulate the charterer's right to present bills of lading issued under the charter including a Clause Paramount (thus incorporating the Hague Rules).<sup>90</sup> Consequently, the owner was exposed to the Hague Rules liability scheme for cargo damage due to the operation of the Clause Paramount, that he would not have been exposed under the charter. Thus, both Clause Paramount and rider clause altered the indemnity regime in the charter, and the Court decided to exit the problem analyzing the reasonable contemplation of the parties at the time they entered into the contract. This made the Clause Paramount/rider clause part of the overall bargain in the charter. In other words the Clause Paramount would necessarily expose the shipowner to the Hague Rules liability regime to a bill of lading transferee. Thus, "[...] that must or should, have been obvious [for the Owner]. If the owners wanted an indemnity from the charterers in that eventuality, the obvious course was to ask for one."<sup>91</sup>

In connection with *The C. Joyce* and *The Vestkyst I* type of cases, an appreciated academic effort would be to follow closely new developments on this particular point on indemnities on voyage charters under English and Norwegian law. As stated above, the new amended Gencon contains an express indemnity in Clause 10 and bills of lading shall be issued using Congebil form (a specific bill of lading that includes a Clause Paramount in Clause 2).<sup>92</sup> This is a

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<sup>90</sup> Trond Solvang, 'Bills of lading issued under voyage charterparties: review of legal position under English and Scandinavian law – practical advice on how to secure shipowners' right of indemnity from charterers for liabilities incurred under bills of lading' in *Nordisk Medlemsbladet* (2003), p. 5962.

<sup>91</sup> *The C. Joyce* [1986] 2 Lloyd's Rep 285.

<sup>92</sup> Gencon 1994, Clause 10, lines 158-163 provides: "The Charterers shall indemnify the Owners against all consequences or liabilities that may arise from the signing of bills of lading to the extent that the terms or contents of such bills of lading impose or result in the imposition of more onerous liabilities upon the Owners than those assumed by the Owners under this Charterparty."

question that remains open to new elaborations under both jurisdictions. Thus, new developments may confirm or override what was decided in *The C. Joyce* and *The Vestkyst I*.

A relevant time charter case that dealt with bills of lading and indemnity is *The Caroline P* “[...] in which a time charterer required the owner to sign bills of lading ‘as presented’.”<sup>93</sup> The bills presented by the charterer left the owner with the responsibility for duties that the charterparty did not impose upon him, i.e. cargo stowage and discharge. If one makes a contrast with *The C. Joyce*, one will see that *The Caroline P* involved a much broader obligation of the shipowner because his master would sign bills of lading “as presented”, not considering interaction specifically with any Clause Paramount/rider clause.<sup>94</sup> Also, as referred, in *The C. Joyce* the exposure to the Hague Rules was foreseeable for the owner. If a particular indemnity was actually a term of the contract, the owner should have demanded it expressly during the contract negotiation.

In *The Caroline P* the more general obligation upon the shipowner (to sign bills of lading “as presented”) did not seem to make *all the consequences* reasonably predictable for him at the time of entering into the contract, thus, granting the indemnity was consistent with the foreseeability element.

Furthermore, *The Island Archon* case was based on the following facts: During the charter period, the Island Archon carried cargo to Iraq. Once discharged, claims were made against the shipowner due to shortage and the owner was held liable. Consequently the owner looked for indemnity. However, the arbitrator dismissed the indemnity claim on a formal issue, due to the lack of inclusion of the indemnity in the shipowner’s plea. The owner appealed and looked for indemnity towards the charterer due to cargo claims before an English Court.<sup>95</sup>

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<sup>93</sup> [1984] 2 Lloyd’s Rep 466; also see Foxton, p. 108.

<sup>94</sup> *The C. Joyce* [1986] 2 Lloyd’s Rep 285.

<sup>95</sup> *The Island Archon* [1994] 2 Lloyd’s Rep. 227.

References that the Court makes to English case law on bills of lading (at p. 402 *et seq.*) are illustrative and particularly interesting in cases of disparity between bills of lading and time charter terms.

Another interesting and recent case is *The Ikariada*. In this case indemnity was triggered due to an obligation of providing with a specified bill of lading for master's signature. However, again another voyage charter case, it applies to time charters as a matter of principle. As per Davidson, the importance of this case is the following: (i) there should be no indemnity, if the terms of the bills of lading coincide with the terms required by the charter, i.e. an appropriate bill of lading; (ii) to determine the pertinence of the bill of lading, one has to look at the charter; (iii) if bills of lading incorporate greater liability terms that is a matter of interpretation; (iv) if the master has the obligation of signing a bill of lading as presented, and he signs and the terms are more onerous to the shipowner, there may be an implied indemnity situation; (v) the master is not obliged to sign bills of lading presented without fulfilling the specified form.<sup>96</sup>

As stated above, under English law, if there is an explicit and precise reference to an indemnity in a charter, that is a term of the charter, one will be facing an express indemnity situation. If there is not such an express reference, there will be an implied indemnity. However, both are conditioned to the additional requirements of causation, remoteness, compliance with the charterer's orders, specified form or not, for bills of lading.

In conclusion, English solutions on indemnity situations of discrepancy between bills of lading and charterparties are not radically different compared to solutions under Norwegian law. However English law differs when analyzing implied indemnities, based on compliance of charterer's instructions and terms that may reasonably be implied in fact.

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<sup>96</sup> Simon Davidson, Charterparty indemnities.

<<http://www.ukpandi.com/knowledge/article/charterparty-indemnities-1481/>> Accessed 25.09.2013; *The Ikariada* [1999] 2 Lloyd's Rep. 365.

Next Chapter deals with practical considerations when drafting indemnity clauses in time charters under Norwegian law and conclusions.

### 3 PRACTICAL CONSIDERATIONS AND CONCLUSIONS

#### 3.1 Practical considerations

Some practical considerations at the time of drafting indemnities in time charters under Norwegian law would be to insert an express reference to indemnity for mandatory rules in order to avoid uncertainty.<sup>97</sup> For example: (i) Under Shelltime Clause 13 (a) (i), lines 145-148, the indemnity language would be as follows: “Charterers hereby indemnify Owners against all consequences or liabilities that may arise (i) from signing bills of lading in accordance with the directions of Charterers or their agents, to the extent that the terms of such bills of lading fail to conform to the requirements of this charter, or (except as provided in Clause 13 (b)) from the master otherwise complying with Charterers’ or their agents’ orders, *or (notwithstanding as provided in Clause 38) against liabilities imposed to Owners due to application of mandatory rules*”. [Emphasis added]; (ii) Under Baltime Clause 9, lines 123-128, the wording may be the following: “The Charterers shall indemnify the Owners against all consequences or liabilities arising from the Master, officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders, as well as from any irregularity in the Vessel’s papers or for overcarrying goods, *or against liabilities imposed to Owners due to application of mandatory rules*.” [Emphasis added] (iii) Under NY Produce Clause 30 (b), lines 311-314: “All bills of lading or waybills shall be without prejudice to this Charterparty and the Charterers shall indemnify the Owners against all consequences or liabilities which may arise from any inconsistency between this charterparty and any bills of lading or waybills signed by the Charterers or by the master at their request, *or (notwithstanding as provided in Clause 31*

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<sup>97</sup> Professor Trond Solvang suggested some draft examples for voyage charter indemnities on how to secure shipowners’ right of indemnity against charterers for liabilities incurred under bills of lading. His view has been expressed in the article ‘Bills of lading issued under voyage charterparties: review of legal position under English and Scandinavian law – practical advice on how to secure shipowners’ right of indemnity from charterers for liabilities incurred under bills of lading’ in *Nordisk Medlemsbladet* (2003), p. 5966.



(a)) against liabilities imposed to Owners due to application of mandatory rules” [Emphasis added]

### 3.2 Conclusions

As for the answer to the first question presented in part 1.1 of this dissertation, i.e. “How indemnities have been understood, in time charters, under Norwegian and English law?” Norwegian and English understandings do match in fact on how indemnities are conceptualized in time charters. However, legal bases differ probably due to characteristics of their legal systems. Within both jurisdictions, indemnities have the same purpose, i.e. to restore the allocation of risk balance under the charter.

As for the answer to the second query, “Whether or not solutions on indemnities in time charters would be similar in Norway and England, in situations where the shipowner incurs greater liability for bills of lading inconsistent with charterparty terms”, Norwegian and English law are different.

When it comes to analyzing terms in bills of lading under Norwegian law, one has to consider: (i) if bill of lading terms “impose liability in excess” of the charter terms, pursuant to Sections 382 (cf. 338); (ii) and, the operation of mandatory rules (under Chapter 13 of the Maritime Code), which may restrict owner’s indemnity recourse.

Under English law the latter questions are conceptualized as follows: (i) bills of lading disparity is a pure problem of construction of the bills of lading terms under the charterparty (not under the English Carriage of Goods by Sea Act);<sup>98</sup> (ii) one has to distinguish

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<sup>98</sup> Generally, charterparties referred to in this dissertation have been drafted to be subject to English law. Norwegian law, in some cases can construe clauses differently. This problem has been very well explained in *The Arica* arbitration award, ND 1983.309 (*The Arica*), a Texacotime case, on the interpretation of an off-hire clause. For English translation of *The Arica*, see Maritime Law Case Collection (JUS 5401/5402), Maritime Law, Nordisk Institutt for Sjørett, Sjørettsfondet, 2001, p. 46. Thus, one can see the impact that other legislation may have on said indemnity recourses meant to be governed by English law (cf. Section 338, 382 of the Norwegian Maritime Code plus preparatory works).

between bills of lading “as presented” and “required in a specified form” (as per *The Ika-riada*); (iii) implied indemnities are implied terms in fact and in particular in the time charter context these are based on the observation charterer’s orders; (iv) considerations of causation and foreseeability will be relevant as well.

As said above, in Norway implied indemnities are based on statutory provisions (Section 338 and 382) that clearly state that remedy maybe required if certain circumstances are fulfilled, e.g. bills of lading with different terms as those in the charterparty (as per *The Vestkyst I*). The deficiency of this approach is based on the lack distinctions and on the lack of explanation regarding the object and content of mandatory rules that *The Vestkyst I* case created and that the 1993 Maritime Law Committee picked-up. One may wonder if that was the intended definite solution that the drafters of the 1994 Code had in mind for time charters.

In addition, as per prof. arbitrator Brækhus in *The Jobst Oldendorff* arbitration award, general Norwegian contract law may be a suitable general basis for indemnity. One may agree or not with the more general approach, but the particular doctrine developed by his award on the “functions/duties” of the parties may assist when understanding time charter implied indemnities subject to Norwegian law.<sup>99</sup>

As said, in England, implied indemnities have been understood as a broader right to claim for liabilities incurred when obeying charterers’ orders. Furthermore, the other basis would be represented by the implied indemnity of the shipowner founded on a line of common law cases that recognizes a right to claim for indemnity for losses in the absence of express terms, but which requires other conditions, as we have seen (*Dugdale v Lovering* and *Moel Tryvan*). Terms implied in fact are subject to two tests, the business efficacy test or the officious by-stander test (a fly on the wall).<sup>100</sup>

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<sup>99</sup> Cf. Section 381, third paragraph.

<sup>100</sup> Jill Poole, *Contract Law*, (11<sup>th</sup> edn, Oxford 2012), p. 209, expressed that implied terms under English law are terms not expressed in the contract, however courts recognize these terms in order “[...] to fill gaps on the basis of giving effect to the deemed intentions of the parties and/or on the basis of ‘necessity’.” Implied terms may be implied in custom or

However, as elaborated, both English and Norwegian systems have developed their particular legal devices to solve the issue of implied indemnities in time charters in order to guarantee their workability.

Finally, from a *lex ferenda* perspective, two essential aspects need to be provided with a legislative or judicial response in Norway: (i) whether indemnity claims in the context of time charters due to issuance of bills of lading with discrepancies would be subject to *The Vestkyst I* test (with the mandatory rules exception included) and why; and (ii) what would be the solution when the charterer does not *incarnate* a cargo interest and there is an express indemnity in the contract.

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usage as per *Hutton v Warren* (1836) 1 M & W 466, implied in fact, implied in law; see also *The Moorcock* (1889) 14 PD 64; *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] Bus LR 1316, 1 WLR 1988; *Mediterranean Salvage Towage and Towage Ltd v Seamar Trading and Commerce Inc.*, *The Reborn* [2009] EWCA Civ 531, [2010] 1 All ER (Comm) 1, [2009] 1 CLC 909. Furthermore, terms implied in fact must be implied into the same type contracts, necessary, reasonable and assure contract efficacy.

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